United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

No. 75-4141

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ITT CONTINENTAL BAKING COMPANY, INC., *Petitioner,*

v.

THE FEDERAL TRADE COMMISSION, *Respondent.*

TED BATES & COMPANY, INC., *Petitioner,*

v.

THE FEDERAL TRADE COMMISSION, *Respondent.*

On Petitions for Review of Orders of the Federal Trade Commission

BRIEF FOR PETITIONER ITT CONTINENTAL BAKING COMPANY, INC.

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BRIEF FOR PETITIONER ITT CONTINENTAL BAKING COMPANY, INC.

These are petitions for review of a cease and desist order issued by Respondent, the Federal Trade Commission (hereafter called the Commission) on October 19, 1973 and of an order of the Commission issued December 14, 1973 modifying in part and otherwise affirming its initial order. Petitioner is ITT Continental Baking Company, Inc.[1]

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1 These petitions were initially filed in this Court but were transferred to the Court of Appeals for the District of Columbia Circuit because a prior petition for review of the cease and desist order had been filed there. After briefing and argument of the case on the merits, the District of Columbia Circuit dismissed the prior petition (and two others filed by the same petitioners) and ordered these petitions re-transferred here. Consumer Federation of America v. FTC, 515 F.2d 367 (D.C. Cir. 1975).

I. PRELIMINARY STATEMENT

The unsigned opinion of the Commission supporting its order of October 19, 1973 (1 App. 182-238)[2] has been unofficially reported at 3 CCH Trade Reg. Rep. ¶ 20, 464 (FTC 1973) and the unsigned Order Ruling on Petitions For Reconsideration of December 14, 1973 (1 App. 272-77) has been unofficially reported at 3 CCH Trade Reg. Rep. ¶ 20,495 (FTC 1973).

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

This appeal presents the basic issue of whether, on this record, the Commission could lawfully enter, as it did, a sweeping cease and desist order regulating all of the advertising of ITT Continental Baking Company, a multi-line manufacturer of food products. Specifically, the questions presented are:

1. Whether the Commission violated applicable law when it based a finding of violation upon a construction of a secondary complaint allegation that is contrary to the plain meaning of the allegation, had never before been articulated during the agency proceedings, and as to which ITT Continental was afforded no notice or reasonable opportunity to defend.

2. Whether the record contains evidence that the advertising in issue conveyed the meaning now assigned to it by the Commission under its new construction of the complaint or was otherwise unlawful.

3. Whether the Commission could reach any decision on the meaning of the advertising to children without reference to the record evidence or the relevant findings of the Administrative Law Judge.

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[2] By leave of this Court, and stipulation of the parties, this appeal is being heard on the Joint Appendix dated December 30, 1974 and filed in the prior proceedings in this case in the Court of Appeals for the District of Columbia Circuit. That appendix is cited in this brief as "App."

4. Whether the Commission may bootstrap itself from a finding of violation as to one advertising message concerning one product into an order regulating the advertising of all of the Company's products, the advertising for one of which was specifically found to have been lawful in the same agency proceeding and whether, in other respects, the Commission's order is sufficiently definite and reasonably related to the violation claimed to have been found.

III. STATEMENT OF THE CASE

These petitions seek review of a cease and desist order of the Federal Trade Commission that broadly regulates the advertising of any food product of ITT Continental, a major manufacturer of baked goods and other foods.[3] The order arose from a Commission proceeding (FTC Docket No. 8860) commenced by complaint issued on August 24, 1971. The Commission alleged that ITT Continental and its advertising agency Ted Bates & Company, Inc. had engaged in false and unfair advertising of ITT Continental's products Wonder bread and Hostess snack cakes in violation of Sections 5 and 12 of the Federal Trade Commission Act (15 U.S.C. §§ 45, 52).

As will appear more fully below, it may fairly be said that the evidence failed to sustain a single allegation of the Commission's complaint. The Commission dismissed the principal charges against Wonder advertising and *all* of the charges against Hostess advertising. The broad order entered rests on a construction of a single complaint allegation concerning Wonder that was not remotely suggested by anyone until the Commission issued its opinion

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[3] As used in this brief, "FTC Opin." refers to the Commission's opinion of October 19, 1973 and "Opin. on Recons." to its opinion of December 14, 1973; "CX" refers to Commission Exhibits and "RX" to Respondent's Exhibits; the Initial Decision is "I.D."; the Appeal Brief filed by complaint counsel before the Commission is "App. Br." The transcript is cited "Tr." and page number or, where appropriate, by witness and page number. Some other clear abbreviations are also employed.

and as to which ITT Continental accordingly had no opportunity to defend.

1. *The Advertising at Issue.* Advertising for Wonder was for many years based on a nutritional theme.[4] This advertising typically incorporated the slogan "Wonder bread helps build strong bodies 12 ways," which was adopted for the advertising only after it had been reviewed and cleared at the Federal Trade Commission. Anderson 2501-03 (2 App. 422-24); RX 31 (3 App. 519-21). The accuracy of this claim was not challenged by the complaint.

As it related to Wonder, the focus of the agency proceeding was upon two television advertising campaigns. FTC Opin. 5-8 (1 App. 203-06). The first of these was the "Wonder Years" campaign, which was employed between 1964 and 1970. *Id.* at 5 (1 App. 203). Commercials from this campaign were submitted to the Commission staff during the course of an investigation of Wonder's advertising that terminated in 1965 upon the staff's conclusion that "the public interest does not justify . . . corrective action at this time. . . ." Thomas 2157-58 (2 App. 397-98); Anderson 2507-08 (2 App. 428-29); RX 34, Memorandum of January 11, 1965, at 5 (3 App. 529).

Attached to this brief as Appendix A is a "story-board" (CX 13) of a 30-second television commercial that is typical of the advertising from the Wonder Years campaign. This advertising promoted the nutritional value of the product's ingredients, which value has not been challenged by the Commission. It also featured, as a visual insert, the so-called "fantasy growth sequence" in which, through a routine photographic technique, a small child was portrayed as growing to the size of a 12-year-old in a few seconds of the commercial.

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[4] Nutritional advertising for Wonder was abandoned by ITT Continental in 1971 for reasons not associated with the pendency of this proceeding; the Company concluded that nutritional messages were not of sufficient consumer interest to affect sales of bread. Hackett 2118-24 (2 App. 380-86).

The second campaign challenged in this case was the so-called "How Big?" campaign, which commenced in 1970 and ended the following year. A representative storyboard of a 30-second commercial from this campaign (CX 20) is attached as Appendix B. Again, this advertising promoted the unchallenged nutritional value of Wonder and included the fantasy growth sequence.

It was stipulated below that Wonder's television advertising was always designed primarily to reach women 18 to 49 with children below the age of 18. CX 175 ¶ 2 (3 App. 508); Richel 2731-32 (2 App. 440-41). Until September 1970, a small amount of the advertising budget for Wonder was also spent for advertising Wonder on television programs for children. RX 59 (3 App. 531); Richel 2734, 2744-45 (2 App. 442, 449-50); CX 175 ¶ 2 (3 App. 508). As appears from Commission Exhibit 27, which is the script of the only advertisement for children's television received in evidence (CX 27; *see* FTC Opin. 8-9 (1 App. 206-207)),[5] this advertising was quite different from that intended for adults. As the Commission indicated (Opin. on Recons. 2 (1 App. 273)), it did not contain the fantasy growth sequence. Some children would, of course, have been present in the television audience when advertising containing the fantasy growth sequence and intended to reach adults was broadcast. CX 175-76 (3 App. 507-18).

The campaign for Hostess snack cakes challenged in the proceeding was used briefly in 1970 and 1971 to announce to consumers that ITT Continental (after a year's work) had succeeded in enriching those products with three B vitamins and iron, a nutritional advantage unavailable at the time in any competing product. Because this advertising was completely exonerated, it need not be discussed further at this point.

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[5] The script for another similar advertisement is quoted in FTC Opin. 9 n.10 (1 App. 207) but is not in the record.

2. *The Complaint, the Evidence, and Complaint Counsel's Appeal.* The principal issue the complaint raised was the charge of paragraph 8(a) that the above advertising falsely implied that Wonder was "an outstanding source of nutrients, distinct from other enriched breads." At an early point in the proceeding, complaint counsel noted with reference to this allegation, that "that is really the heart of the Commission's case, that the Wonder Bread ads in the past have represented that Wonder Bread is a unique bread . . . ." Tr. 8 (2 App. 280). It was purportedly to eliminate the residual effects of this alleged misrepresentation that so-called "corrective" advertising was sought as a remedy in the case.[6]

Paragraph 8 also charged that Wonder's advertising made a series of other assertedly false claims for the product. It alleged in substance that the advertising claimed that Wonder supplied all the nutrition necessary for a child's healthy growth and development and that "the optimum contribution" a parent could make to his child's nutrition was to assure regular consumption of Wonder. The complaint also charged that the advertising exaggerated the nutritional quality of the protein in Wonder. Complaint, ¶¶ 8(b)-(e) (1 App. 21). By its answer, ITT Continental denied making any of the claims alleged by paragraph 8. Answer of ITT Continental Baking Company, Inc., Fifth Defense, ¶ 8 (1 App. 40).

Paragraphs 10 and 11 of the complaint advanced different theories of violation and it was on paragraph 10 (and that paragraph alone) that the Commission purported to base both its finding of violation and the order under review here. Paragraph 10 alleged that:

> "Certain of the aforesaid advertisements are addressed primarily to children or to general audiences

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[6] The novel "remedy" of corrective advertising would have required future advertising for Wonder to confess that the Commission had found past advertising for the product false. The Commission found no record basis to enter such an order in this case. FTC Opin. 31-32 (1 App. 229-30).

> which include substantial numbers of children, which advertisements tend to exploit the aspirations of children for rapid and healthy growth and development by falsely portraying, directly and by implication, said Wonder Bread as an extraordinary food for producing dramatic growth in children.
>
> "Therefore, the aforesaid acts and practices of respondents were and are false, misleading, deceptive, and unfair." (1 App. 23).

Paragraph 11 charged that the advertising exploited parental concerns for growth of their children by falsely portraying Wonder "as a necessary food for their children to grow and develop to the fullest extent during the preadolescent years." The Commission rejected this allegation for failure of proof. FTC Opin. 20, 22 (1 App. 218, 220).

Unlike the allegations of paragraph 8, which did not charge "unfair" advertising, the language of paragraph 10 was clearly designed to require proof of something more than a false claim as to Wonder. Indeed, the very gist of this charge lies in its language respecting exploitation. Second, the misrepresentation alleged was obviously a misrepresentation only to children.

At the hearing level, complaint counsel drew these same distinctions between the charges of paragraphs 8 and 10. Th , the latter was labeled the "exploitation of children issue" and was stated to include the questions whether "the challenged advertisements portrayed *to children* that Wonder Bread as [sic] an extraordinary food for producing dramatic growth in children" and whether such a portrayal "was false and misleading *to children* . . . ." Trial Memorandum of Complaint Counsel, June 12, 1972, at 6, 7 (1 App. 55, 56) (emphasis added). Similarly in opening remarks on the first day of the hearing, complaint counsel stated with respect to paragraphs 8, 10 and 11:

> "[T]he Wonder Bread case involves two major areas. One is an allegation that certain challenged represen-

tations were made in the ads to the general public. The second case, the second portion of the case, involves a charge that children and parents were exploited by false representations contained in the ads." Tr. 352 (2 App. 302).[7]

Because all of the allegations of paragraph 8 were ultimately (and unanimously) dismissed, it would serve little purpose to review in detail here the evidence presented on the "uniqueness" issue and on the further question whether "corrective" advertising would be an appropriate remedy in the event that allegation was sustained. It is sufficient to say here that, on these questions, each side presented a considerable amount of empirical data drawn from various surveys of consumer attitudes, expert opinion on the significance of this data, and expert opinion on whether consumers either did or would be likely to understand the challenged advertising to make the claim alleged by paragraph 8(a).[8] Some of this testimony as to the general consuming public also touched on other issues raised by paragraph 8. But none of it purported to address paragraph 10.

To support paragraph 10, complaint counsel summoned two child psychiatrists and a pediatrician. The substance of their testimony was their belief that some children below the age of six would perceive the fantasy growth sequence as stating as literal fact that a child could achieve instantaneous growth by eating Wonder bread and that

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[7] After the hearing, complaint counsel continued to adhere to this distinction, as is shown by Complaint Counsel's Proposed Finding of Fact 27 (1 App. 60). *See also* Complaint Counsel's Memorandum In Support of Proposed Findings of Fact, Conclusions of Law and Order, Nov. 6, 1972, at 26-28 (1 App. 62-64). That the Administrative Law Judge also understood the distinction is shown by his adoption of that proposed finding. I.D., Finding 30 (1 App. 80).

[8] The Court can acquire an appreciation of the nature and extent of the expert testimony, survey and other statistical material introduced on these issues from the Initial Decision. I.D., Findings 33-145, 232-55 (1 App. 81-108, 130-36).

such a message was exploitive because of children's aspirations for growth. *E.g.*, Galdston 424-25, 430-31, 465, 469 (2 App. 309-10, 313-14, 315, 316); Granger 507-09, 517-19 (2 App. 323-25, 329-31); Solnit 608, 616-17 (2 App. 342, 345-46).[9] Respondent also presented the testimony of a child psychiatrist on the allegations of paragraph 10. This psychiatrist testified that although some children below age six exposed to the fantasy growth sequence might hope that Wonder would cause immediate growth, discovering that it would not would be nothing more than a normal learning experience that could not be expected to have any damaging impact. Littner 2286-89 (2 App. 404-07).

Thus, the issues posed by paragraph 10 were presented to the Commission principally on the testimony of these witnesses. This testimony was concerned exclusively with complaint counsel's claims in support of paragraph 10 that children below age six who saw the fantasy growth sequence[10] would (a) understand the ad to claim that Wonder bread would actually cause such dramatic growth in a few seconds, and (b) that children who did so understand the fantasy sequence would be psychologically wounded through feelings of inadequacy at not themselves

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[9] Two of these witnesses also objected to CX 27, which had been used at some point before September 1970 on the children's program Captain Kangaroo, because it was delivered by the host of a child's program. Granger 528 (2 App. 333); Solnit 622-23 (2 App. 348-49). But as the Administrative Law Judge found (I.D., Finding 158 (1 App. 112)), no evidence was received that children would understand this commercial as containing the false promise of dramatic growth that the complaint alleged and that the Commission's witnesses claimed to find in the fantasy growth sequence.

[10] It was established that well before the complaint in this case was issued, ITT Continental determined that any television advertising of Wonder to children made no business sense because of market survey evidence that children had no significant influence over bread purchasing decisions. Hackett 2143 (2 App. 391). Accordingly it had, in 1970, cancelled all advertising on children's programs and adopted a strategy of buying television time designed, among other things, to reduce exposure of children to Wonder's television advertising. Richel 2739-40 (2 App. 445-46).

achieving such growth, or by learning to distrust the adult world, both such theories having been advanced by Commission witnesses. *See* App. Br. 36-41 (1 App. 148-53). On this testimony staff counsel argued to the Commission that the fantasy growth sequence was "unfair" and therefore in violation of Section 5 of the FTC Act.

Neither side at the hearings made any effort to develop record evidence of whether the advertisements in issue falsely represented to adults that Wonder was "an extraordinary food for producing dramatic growth in children." Each side at the hearings construed Paragraph 10 to raise an "exploitation" issue, and that issue was understood by both sides to be—and obviously was—limited to exploitation of children. Accordingly, and in contrast to all other issues in this hotly contested proceeding, the record contains no evidence offered on the question whether, as the Commission held, the advertisements represented to adults that Wonder was an extraordinary food for producing dramatic growth in children.

On December 18, 1972, the Administrative Law Judge issued his Initial Decision that dismissed the complaint in all respects. This decision thoroughly canvassed, in 76 single-spaced pages, every issue in the case and found complaint counsel's evidence wanting on all of them.

With respect to paragraph 10, the Administrative Law Judge noted the testimony concerning the possibility that some young children might misunderstand the fantasy growth sequence as literal truth (I.D., Finding 153 (1 App. 110-11)). In dismissing the charge, he pointed to the absence of foundation for the opinion testimony that had been received (I.D., Finding 151 (1 App. 110)) and noted also the evidence of numerous factors other than the advertising itself that might affect a child's perception of it. I.D., Findings 153, 156 (1 App. 110-11). The Initial Decision also reflects concern with the absence of any evidence that the potential for misunderstanding by young

children would be of any commercial significance. I.D., Findings 147, 157 (1 App. 109, 111). Finally, the Administrative Law Judge rejected a contention advanced by complaint counsel on the "exploitation" question that television advertising was somehow harmful to young children. I.D., Finding 159 (1 App. 112).

Complaint counsel appealed to the Commission. With respect to paragraph 10, they assigned error in the Administrative Law Judge's failure to find that Wonder advertisements "are false and misleading to and exploit children." App. Br. 33 (1 App. 145). The gist of their argument to the Commission was summarized in the following language:

> "Because of their heightened interest in, and lack of understanding about, their own growth and their inability always to distinguish between reality and fantasy, children tend to perceive the Wonder Bread television advertisements as promising dramatic physical growth as a result of consuming Wonder Bread . . . .
>
> "In particular, children below approximately the age of six tend to perceive the 'How Big' and 'Wonder Years' ads as promising that children will grow as quickly as the child depicted in the growth sequence." *Id.* at 37 (1 App. 149) (citations omitted).

Complaint counsel also argued that children were "exploited" by the advertising, principally because of its alleged adverse psychological effects. *Id.* at 39-42 (1 App. 151-54). Because of the "exploitation" claims in paragraph 10, 11 and 15[11] of the complaint, they specifically requested that the respondents be enjoined from "[t]aking unfair advantage of the natural emotional aspirations or concerns of people." *Id.* at 58, 76 (1 App. 156, 159).

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11 Not previously mentioned in this brief, paragraph 15 was an allegation that Hostess advertising tended to exploit certain "guilt feelings." It was dismissed by the Commission. FTC Opin. 24 (1 App. 222).

At oral argument before the Commission, complaint counsel again stressed that "very small children" exposed to advertisements containing the growth sequence "will take them literally, will believe that Wonder Bread is somehow special." Oral Argument, April 18, 1973, Tr. 23 (2 App. 467). In response to a question from the bench as to the purpose of the "unfairness" allegation, he claimed that "we could have made out a violation based solely on deception" but went on to point out that the staff was also seeking "an order that would prohibit the unfair use of advertising themes to any audience. . . ." *Id.* at 24 (2 App. 468).

As thus presented to the Commission, paragraph 10 retained the shape it had acquired the day the complaint issued: it alleged that Wonder's advertising was both false and "unfair" because it exploited children's concerns for growth by falsely portraying (to children) that Wonder was an extraordinary food for producing dramatic growth. And the only evidence advanced to support the misrepresentation aspect of the charge was testimony that some of the very young who might be exposed to the fantasy growth sequence would accept it as literal truth.[12]

3. *The Commission's Decision and Opinion on Reconsideration.* As indicated above, the Commission's opinion dismissed the complaint in almost every respect. The challenged advertising for Hostess was completely exonerated. FTC Opin. 22-24 (1 App. 220-22). As for Wonder bread, the Commission unanimously dismissed all the nutrition misrepresentation claims of paragraph 8, and also dismissed the allegation of paragraph 11 relating to exploitation of parental concerns for the growth of their children. FTC Opin. 15-16, 20 (1 App. 213-14, 218).

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[12] There was some testimony that children above the age of six, who did not accept the growth sequence as a portrayal of literal fact, might nevertheless understand the advertising as promising some special growth capacity (Solnit 618 (2 App. 347); Granger 516 (2 App. 328)) but such evidence, though mentioned in complaint counsel's appeal obviously not equivalent to testimony that the product was advertised as an "extraordinary food for producing dramatic growth in children."

Not everything that the Commission did with paragraph 10 is clear from its opinion, but what is clear is that as it emerged from the opinion, the charge no longer bore any relationship to the issues raised by paragraph 10 that were litigated at the hearing. The Commission dismissed the "exploitation" or "unfairness" element of paragraph 10. FTC Opin. 21-22 (1 App. 219-20). As that paragraph had been understood and litigated at the hearing, that conclusion would have resulted in a dismissal of the entire paragraph. However, the Commission went on to reach the astonishing conclusion, never before alleged, that the challenged advertising represented to viewers generally that Wonder was an extraordinary food for producing dramatic growth in children.[13] FTC Supp. Finding 17 (1 App. 192); FTC Opin. 17-20 (1 App. 215-18).

This conclusion is based solely upon the Commission's own interpretation of the challenged advertising. FTC Opin. 17-18 (1 App. 215-16). Finding 17, which states this conclusion as a fact, cites only the advertisements themselves.[14] The Commission did purport to examine other evidence in the record and found it consistent with its own conclusions—a fact that was hardly surprising since no evidence had been offered on the issue, and accordingly there was none in the record. Without comment or explanation, the Commission vacated all of the Administrative Law Judge's findings on the paragraph 10 issues.

Having failed to sustain any allegation in the complaint, the Commission proceeded to fall upon the respondents

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[13] In some key places, the qualifying word "dramatic" is conspicuously absent. *See, e.g.*, Conclusion of Law 2 (1 App. 198); FTC Opin. 19, 20 (1 App. 217, 218).

[14] FTC Supp. Finding 17 (1 App. 192). The Finding was:

> "The challenged Wonder Bread television advertisements represent *to viewers* that Wonder Bread is an extraordinary food for producing dramatic growth in children. (CX 1-26, 28-30(d))" (emphasis added).

There are two interesting aspects to the citation. First, none of the exhibits cited purported to be children's commercials. CX 27, the script for an advertisement on Captain Kangaroo, was omitted. Second, although the finding refers only to television advertisements, CX 28-30(d) were print advertisements.

with a sweeping cease and desist order. Despite its complete exoneration of Hostess nutrition advertising, the order extends to "any food product" and enjoins any nutritional misrepresentation in any advertising for any food product. It also contains, in paragraph I(1), a series of prohibitions, again as to the advertising for any food product, that bear no resemblance to any sanction ever before proposed in the proceeding. Indeed, by paragraph I(1)(c) the order even regulates a claim of essentiality that the Commission had explicitly found, contrary to its complaint allegation, was *not* contained in the challenged Wonder advertising. *See* pages 37-46, *infra*.

In its opinion on reconsideration, the Commission strove to fill in the gaps between the complaint language, its own opinion and findings, and the order it issued. It began by admitting that "the thrust of [paragraph 10] . . . is directed to the effect of the challenged advertisements on children" and then claimed that its finding of violation was based on that view. Opin. on Recons. 2 (1 App. 273).[15] It conceded, however, that it had gone beyond those limits to the conclusion that the advertising had the capacity also to lead parents to believe that Wonder bread is an extraordinary food for producing dramatic growth in children. It attempted to justify this action by stating that if adults were so deceived, it was a reasonable assumption that children would be as well. *Id.*

IV. SUMMARY OF ARGUMENT

The Commission decided this case on a theory of violation that was not alleged by the complaint, litigated at the hearing, or suggested by anyone until the Commission's decision was issued. By entering any order in this cir-

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[15] The sweeping order entered, however, plainly rests on the Commission's conclusion, also stated in its opinion on reconsideration, that Wonder's advertisements were deceptive not only to children but also to "the entire audience viewing them." *Id.* at 2 (1 App. 273).

cumstance, the Commission violated ITT Continental's constitutional and statutory right to notice of the charges against it and deprived ITT Continental of an opportunity to be heard on those charges.

The advertising at issue was not unlawful and no evidence supports the conclusion that it was. The advertising does not have the capacity to deceive any relevant audience in the manner found by the Commission. Moreover, to the extent that the violation found involved a misrepresentation to children, the Commission ignored the record and the Initial Decision on that issue, in contravention of principles of administrative law.

Finally, the order entered by the Commission bears no reasonable relationship to any wrongdoing conceivably reflected by this record, and in important respects, it is framed in terms so imprecise as to be virtually incomprehensible.

For these reasons, the Court should reverse with instructions that the complaint be dismissed or that further proceedings be had in conformity with its opinion.

V. ARGUMENT

A. ITT Continental Was Deprived of Notice and an Opportunity To Be Heard on the Violation Found.

The Commission concluded that Wonder's advertising "had the capacity to deceive children and parents" by portraying Wonder as an extraordinary food for producing dramatic growth in children. FTC Opin. 18 (1 App. 216); FTC Supp. Finding 17 (1 App. 192); Opin. on Recons. 2 (1 App. 273). In the following sections of this brief we discuss the lack of record basis for the Commission's conclusion that the advertising had the capacity to deceive the consuming public in this manner and we believe that this failure of proof requires that the agency order be set aside and the complaint dismissed. First, however, we believe the Court should consider the threshold question of whether, compatibility with the requirements

of due process and the Administrative Procedure Act, the Commission could adjudicate this question in the circumstances of this case adversely to ITT Continental. The law is plain that it could not.

Section 5(b) of the Administrative Procedure Act requires that "[p]ersons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law asserted." 5 U.S.C. § 554(b)(3) (1970). In a leading decision applying this statute to a Commission proceeding, the Court of Appeals for the District of Columbia Circuit said:

> "[I]t is well settled that an agency may not change theories in midstream without giving respondents reasonable notice of the change . . . .
>
> * * *
>
> ". . . [T]he Commission has deprived petitioners of both notice and hearing on the substituted issue. The evil at which the statute strikes is not remedied by observing that the outcome would perhaps or even likely have been the same. It is the *opportunity* to present argument under the new theory of violation which must be supplied." *Rodale Press, Inc.* v. *FTC*, 407 F.2d 1252, 1256-57 (D.C. Cir. 1968) (emphasis in original).

This principle was applied by the Court of Appeals for the Sixth Circuit in *Bendix Corp.* v. *FTC*, 450 F.2d 534, 542 (6th Cir. 1971); it was also adopted by this Court in *Stanley Works* v. *FTC*, 469 F.2d 498, 508 n.24 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1973). In *Stanley Works*, the Court squarely ruled that the Commission had no authority to consider a theory of illegality that had not been litigated before the hearing examiner. *Id.* These decisions simply applied to adjudications by the Federal Trade Commission an elemental rule of constitutional and administrative law. *See, e.g., Bowman Transp. Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4 (1974); *NLRB* v. *United Aircraft Corp.*, 490 F.2d 1105, 1112 n.9

(2d Cir. 1973); *National Realty & Constr. Co.* v. *Occupational Safety & Health Review Comm'n,* 489 F.2d 1257, 1267 n.40 (D.C. Cir. 1973); *Jaffee & Co.* v. *SEC,* 446 F.2d 387, 392-94 (2d Cir. 1971); *NLRB* v. *Majestic Weaving Co.,* 355 F.2d 854, 861-62 (2d Cir. 1966); *NLRB* v. *Johnson,* 322 F.2d 216, 219-20 (6th Cir. 1963), *cert. denied,* 376 U.S. 951 (1964); *NLRB* v. *H. E. Fletcher Co.,* 298 F.2d 594, 600 (1st Cir. 1962); *cf. In re Ruffalo,* 390 U.S. 544, 550-52 (1968).

It is well established that in an administrative adjudication such as this proceeding, notice, to be timely as the Administrative Procedure Act requires, must be given before the evidentiary hearing. *See, e.g., Bendix Corp.* v. *FTC,* 450 F.2d 534, 542 (6th Cir. 1971); *Jaffee & Co.* v. *SEC,* 446 F.2d 387, 394 (2d Cir. 1971); *NLRB* v. *Majestic Weaving Co.,* 355 F.2d 854, 861-62 (2d Cir. 1966). Due process of law itself requires that the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *E.g., Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965). But the opportunity to be heard is obviously meaningless if it is not preceded by notice of the issues to be litigated. Absent such notice, it is not surprising that a respondent such as ITT Continental finds itself, in this Court's words, having "won a battle but lost a war it had no reason to know it was waging on a battlefield it had never entered." *Jaffee & Co.* v. *SEC, supra,* 446 F.2d at 394.

Until the Commission issued its opinion, no suggestion was ever made that the complaint charged that the adult consuming public might understand the advertising at issue to claim Wonder to be an "extraordinary food for producing dramatic growth in children." To the contrary, both the complaint and complaint counsel had made plain that the issue was altogether different; that is, that paragraph 10 claimed an "exploitation of children" by means of false advertising to children. ITT Continental defended those issues. It could not, however, defend the theory of

violation advanced in the Commission's opinion because it did not know and could not have known that such a theory was even in the case.

In the prior proceedings in this case (*see* p. 1 n.1, *supra*), the Commission did not dispute that if its order was based on an adjudication that the paragraph 10 representation was made to adults, it could not be sustained. It argued instead that:

> "The Commission's opinion on reconsideration . . . makes clear that the Commission only considered the Paragraph 10 allegation as a deception of children and looked to the evidence of how adults considered the advertisements only as indicative of the fact that if a more sophisticated group (adults) could be misled by the advertisements, they would of necessity mislead children who are less sophisticated."[16]

This contention is unpersuasive. Nothing in the Commission's first opinion supports the claim that the violation found under paragraph 10 was a misrepresentation to children alone and nothing in either opinion purports to justify the broad order entered on the basis of such a narrow finding. Any claim that only a violation as to children was found is flatly contradicted by the fact that with its first opinion the Commission entered Finding 16, expressly purporting to deal with children's perceptions of Wonder advertising (though not sustaining the paragraph 10 charge) and then went on, in Finding 17, to find that the paragraph 10 representation was made "to viewers" generally (1 App. 192). The opinion itself contains ample other explicit evidence that the violation being found was a misrepresentation to "parents," to "parents as well as children" (FTC Opin. 17 (1 App. 240)), "children and

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[16] Brief for Respondent, November 1974, Consumer Federation of America, et al. v. FTC, D.C. Cir. Nos. 73-1574, 73-2138, 73-2239, 74-1172, 74-1173, 74-1174, and 74-1199, at 28. Elsewhere, the Commission argued that despite all the evidence to the contrary, it had not even found that the paragraph 10 representation was made to adults. *Id.* at 29, 38 n.30.

parents" (*Id.* at 18 (1 App. 216)), or "consumers" in general. *Id.* at 32 (1 App. 230).[17]

There is similarly no support in the original findings, opinion and order for a claim that the asserted deception of adults was weighed only in concluding that *a fortiori* the advertising would deceive children. Such a suggestion is even contradicted by other passages of the opinion on reconsideration which seek to justify various provisions of the cease and desist order on grounds of a claimed need to protect the entire consuming public, not merely children. For example, in its effort to explain the relationship of paragraph I(1)(a) of its order to the violation found, the Commission made clear that its order was based on a violation involving "deceiving the public," and not deception of children.[18]

In point of fact, the opinion on reconsideration is entitled to no weight on the question presented. It has been said that:

> "repair carpentry cannot be wrought on reconsideration unless the agency addresses itself to the defects. The mere addition of another ground does not establish that the defect in the initial findings was stripped of continuing prejudice." [19]

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[17] The very fact that the Commission considered the possibility of ordering "corrective" advertising (*see* p. 6, n. 6, *supra*) as to the violation it based on paragraph 10 is also persuasive evidence as to the nature of its original adjudication. It was never suggested below that this remedy could be supported by a violation limited to deception of children, and the Commission explicitly considered it with respect to consumers generally. FTC Opin. 32 (1 App. 230).

[18] The Commission said that it was entitled to:

> "prohibit or regulate types of claims that are reasonably related to the past representations and which might constitute alternate roads to the same general goal of deceiving the public." Opin. on Recons. 3 (1 App. 274).

[19] Braniff Airways, Inc. v. CAB, 379 F.2d 453, 467 (D.C. Cir. 1967). *See also* Michigan Consolidated Gas Co. v. FPC, 283 F.2d 204, 220 (D.C. Cir.) *cert. denied*, 364 U.S. 913 (1960), *explained*, National Airlines, Inc. v. CAB, 300 F.2d 711, 713 n.4 (D.C. Cir. 1962). Nor was this an opinion on reconsideration that merely "restated and reinforced" the views of the original decision. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 849 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1970).

The defect here is that a sweeping cease and desist order was entered on the basis of the Commission's determination of an issue as to which neither notice nor an opportunity to defend was afforded. The opinion on reconsideration did not address that defect at all. Rather, it attempted to side-step the defect by placing a cast on the Commission's original opinion that finds no support in that opinion and in fact is contradicted by it.

Reversal here would be required even if one were to accept the suggestion in the opinion on reconsideration that deception of adults was weighed simply as evidence of the deceptive potential of the advertising for children (which it clearly was not). Even were this true, the conclusion as to adults would then appear to represent a basic premise upon which the Commission found the advertising deceptive as to children. This, however, was still "a legal theory or set of facts which was not presented at the hearing." *National Realty & Constr. Co.* v. *Occupational Safety & Health Review Comm'n*, 489 F.2d 1257, 1267 n.40 (D.C. Cir. 1973). Accordingly, it would be "patently unfair" to sustain the order on this basis. *Id.* Adoption of the reasoning advanced by the opinion on reconsideration would still constitute the same sort of "changing theories in midstream" the courts have condemned. *E.g., Bendix Corp.* v. *FTC*, 450 F.2d 534 (6th Cir. 1971); *Rodale Press, Inc.* v. *FTC*, 407 F.2d 1252 (D.C. Cir. 1968).

Moreover, the Commission re-worked the paragraph 10 charge in at least one other significant way. Although the gist of the charge was the tendency of certain Wonder advertisements to "exploit" children's concerns for growth, the Commission held that it did not need to consider the "exploitation" question in order to sustain paragraph 10, and it actually dismissed this aspect of the case. FTC Opin. 21-22 (1 App. 219-20). But as shown above, "exploitation" lay at the very heart of paragraph 10 and that charge could not be sustained in the absence of an affirmative finding on this question.

There can be no reasonable doubt that ITT Continental has been prejudiced by the Commission's handling of paragraph 10. The complaint in this proceeding—perhaps the principal advertising case of the "new" Federal Trade Commission—was widely regarded as presenting novel and important issues regarding the lawfulness of advertising of non-unique products. Each of the issues fairly presented by the complaint was thoroughly litigated during extensive hearings involving substantial expenses of time and money. The record developed on the issues raised by paragraph 8 alone includes hundreds of pages of expert testimony concerning whether consumers would likely understand the challenged advertising to convey the meanings alleged by paragraph 8 and concerning the significance of the great quantity of statistical survey evidence that was also introduced on these questions. The summarization of this evidence by the Administrative Law Judge covers 28 single-spaced pages of the Initial Decision. I.D. 17-44 (1 App. 81-108). It is significant, we think, that as to every issue actually litigated the Commission was required to hold in favor of ITT Continental.

If the issue which the Commission discerned for the first time in its opinion had been fairly presented by paragraph 10 there can be no question but that ITT Continental (and perhaps Commission counsel as well) would have developed the same sort of record that was made on paragraph 8 as to whether in fact the viewing public generally understood Wonder's advertising to claim that product to be "an extraordinary food for producing dramatic growth in children." The record probably would have consisted of expert testimony as to the probable perception of the advertising by adults. It would clearly have consisted of expert analysis of the survey evidence referred to by the Commission (*see* pages 27-30, *infra*) to show that, in fact, this evidence does not support in any way the conclusion that the viewing public understood the ads to represent that Wonder bread would induce dramatic growth in children. Under law the Commission would not have been

free to disregard this evidence and could not have relied on its so-called "expertise" to reach the unsupported conclusion that represents the entire basis for its cease and desist order. *See, e.g., Cinderella Career & Finishing Schools, Inc.* v. *FTC,* 425 F.2d 583, 585-89 (D.C. Cir. 1970).

The Commission here clearly rested its order on a theory of violation as to which ITT Continental was afforded no notice. In view of the evident staleness of the case, reversal with instructions to dismiss the complaint seems appropriate. *See Rodale Press, Inc.* v. *FTC,* 407 F.2d 1252, 1258 (D.C. Cir. 1968). At the very least, remand to the Commission for further proceedings consistent with this Court's opinion is required. *E.g., Bendix Corp.* v. *FTC, supra,* 450 F.2d 534, 542 (6th Cir. 1971).

B. Wonder's Advertising Did Not Represent, Directly or by Implication, That Wonder Bread Is "an Extraordinary Food for Producing Dramatic Growth in Children".

If this Court should decide that the Commission in this case could properly reach the question, the next issue for decision is whether the evidence in the record supports the Commission's conclusion that Wonder advertising represented the product to be "an extraordinary food for producing dramatic growth in children." In reaching its judgment on this question, the Commission appears to have relied almost entirely on its own interpretation of the challenged advertising. Indeed, in its finding of fact that the advertising contained such a representation, nothing other than the advertisements was cited in support. FTC Supp. Finding 17 (1 App. 192).

The meaning of advertising has been held to be normally a matter for decision by the Commission, although the inference it draws from the advertising must be a reasonable one. *FTC* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 386 (1965); *Double Eagle Lubricants, Inc.* v. *FTC,* 360 F.2d 268, 270-71 (10th Cir. 1965); *see In re Pfizer, Inc.,* 81

F.T.C. 23, 58-59 (1972).[20] For a number of reasons, however, the Commission's decision here was obviously erroneous.

In the first place, the Commission's conclusion on this question is irreconcilable with its dismissal of the other allegations of the complaint, most importantly paragraph 8(a). This was the charge that Wonder was advertised as "an outstanding source of nutrients, distinct from other enriched breads." It will be recalled that it was to this question that virtually all of the evidence concerning the meaning of the advertising to consumers generally was addressed at the administrative hearing. The Commission also dismissed a complaint allegation that Wonder was represented to be "a necessary food," etc. FTC Opin. 20 (1 App. 218). The findings that the advertising did not contain these and other related representations cannot be reconciled with the Commission's decision of the unlitigated issue that the Commission found raised by paragraph 10. In particular, it is impossible to follow the logic of a conclusion that Wonder was not advertised as standing out among breads (the issue litigated) but was found to have been advertised as standing out in a broader category "foods" because it would produce "dramatic" growth in children.

It is true that in dismissing paragraph 8(a), the Commission construed the charge to allege that Wonder bread was advertised as superior to all other enriched breads. FTC Opin. 14-15 (1 App. 212-13). It found that no such representation was contained in the advertising. Nevertheless, the only way in which one can reconcile logically the decision on paragraph 8(a) with that on paragraph 10

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[20] With respect to claims of administrative "expertise" on the question of meaning of advertising, it is at least of interest to note that this Court held that in an action for penalties pursuant to 15 U.S.C. § 45(1), the meaning of advertising may be an issue appropriate for resolution by a lay jury. United States v. J.B. Williams Co., 498 F.2d 414, 429-30 (2d Cir. 1974).

is to assume that the Commission also concluded that consumers might understand from the advertising that any number of other enriched breads could constitute "an extraordinary food for producing dramatic growth in children." Such a conclusion is patently untenable.

As Commissioner Jones pointed out in dissent, it is equally difficult to see how the Commission could have concluded that Wonder bread was advertised as an extraordinary food that would produce dramatic growth and at the same time find that it was not represented to be a "necessary food." Dissenting Statement of Commissioner Jones, at 1 (1 App. 234). Such hairline distinctions as the Commission attempted to draw in this case are, we submit, completely arbitrary and cannot be sustained. *See, e.g., Benrus Watch Co.* v. *FTC,* 352 F.2d 313, 317 (8th Cir. 1965), *cert. denied,* 384 U.S. 939 (1966). Particularly because the Commission dismissed paragraph 8(a), after litigation and on a full record, it should be required to dismiss paragraph 10 as well.

It is plain that the evidence the Commission cited does not support its conclusion that "the clear and necessary message of respondents' advertisements" was that Wonder was "an extraordinary food for producing dramatic growth in children." FTC Opin. 17 (1 App. 215). To so hold would be to attribute to the consumer "not only a careless and imperceptive mind but also a propensity for unbounded flights of fancy. This we are not yet prepared to do." *FTC* v. *Sterling Drug, Inc.,* 317 F.2d 669, 676 (2d Cir. 1963).

The complaint allegation that Wonder was portrayed as "an extraordinary food for producing dramatic growth in children" clearly says that it was claimed for the product that it would magically produce "dramatic" growth in children. The charge also gains meaning from the context in which it was actually litigated; that is, that very young

children might perceive Wonder's television advertising, and particularly the so-called fantasy sequence showing growth from 2 to 12 in a few seconds as a statement of literal fact.

The Commission's own analysis of the advertising also mentioned this growth sequence as "a prominent feature" of the "Wonder Years" and "How Big" television commercials. FTC Opin. 17 (1 App. 215). Although the Commission purported to rely on other elements of the advertising as well, it is plain from an examination of the opinion that the only aspect of the advertising that could conceivably convey any message of "dramatic" growth is that growth sequence. Yet, as the Commission itself came close to admitting (FTC Opin. 18 n.17 (1 App. 216)), it is simply incredible to assert that this obviously fanciful aspect of the advertising could really meet the established legal standard for testing the deceptive capacity of advertising; that is, the requirement that there be "a likelihood or fair probability that the [consumer] . . . will be misled." *Ger-Ro-Mar, Inc.* v. *FTC*, 518 F.2d 33, 38 (2d Cir. 1975); *FTC* v. *Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963). The "growth sequence" plainly is nothing more than "obvious fancy" or a perfectly innocuous "eye-catching device," which, by itself, is not an adequate basis for a finding of misrepresentation. *See, e.g., Carter Prods., Inc.* v. *FTC*, 323 F.2d 523, 529 n.11 (5th Cir. 1963), *quoting Colgate-Palmolive Co.* v. *FTC*, 310 F.2d 89, 92 (1st Cir. 1962).[21] And, unlike the advertising in these cited cases, no other aspect of Wonder's advertising could reasonably be taken as a statement that the growth sequence was anything other than unobjectionable "obvious fancy."

The fragments of evidence offered on other issues which the Commission also cited simply serve to underscore the

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[21] The further proceedings in *Colgate-Palmolive* did not disturb the court's judgment, cited in the test, that by itself, "obvious fancy" is not objectionable. *See* FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965), *reversing* 326 F.2d 517 (1st Cir. 1963).

irrationality of its own analysis of the advertising. Thus, the Commission stressed testimony offered on the paragraph 8 issues by Dr. Mendelsohn, a witness for complaint counsel, that the growth sequence

> " 'presents an aspect of awe or wonder regarding the growth process, and *has a great element of fantasy.*' " FTC Opin. 18 n.18 (1 App. 216) (emphasis added).

It also relied on a misstatement of testimony of a witness called by ITT Continental on the question of how the advertising might be understood by the very young for the proposition that

> "the literal message projected by these advertisements is that Wonder Bread will cause children to grow suddenly." FTC Opin. 18 n.18 (1 App. 216).[22]

The opinion on reconsideration cites this testimony as evidence that "these advertisements were deceptive to the entire audience viewing them." Opin. on Recons. 2 (1 App. 273). Dr. Littner's testimony plainly does not support this conclusion, and is not even relevant to it, unless the Commission means to claim that a possible perception of advertising by very young children is to be taken as probative of the likelihood that the advertising would mislead adults. If the reliance is on Dr. Mendel-

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[22] Examination of the context of the cited testimony of Dr. Littner shows that the Commission read far too much into it if it meant to imply that the testimony supported the conclusion of deception of adults, or even that most children would misperceive the advertising. With obvious reference to young children, Littner said only that

> "This is a message in the ad, it *may* cause them to grow suddenly, and . . . some children will *hope* that this is true." Littner 2305 (2 App. 409) (emphasis added).

Other portions of Dr. Littner's testimony reflect that he was addressing only the possible perceptions of the advertising by children age 3-6. *E.g.*, Littner 2288 (2 App. 406).

The purpose of the Commission's further references, in footnote 18 of its opinion, to Dr. Littner's mention of "magical thinking" in young adolescents and "to some degree" in adults is obscure. No one, at least no one other than the Commission, ever suggested that "magical thinking" would cause adolescents or adults to understand the challenged advertising as claiming extraordinary qualities for Wonder in producing dramatic growth in children.

sohn's reference to fantasy, the Commission has applied a wholly irrational standard to the advertising. Thus, advertising is judged deceptive *because* it has a "great element of fantasy," not, as one would have previously thought, *despite* having that characteristic. *See, e.g., Carter Prods., Inc.* v. *FTC, supra,* 323 F.2d at 529 n.11.[23]

The Commission also purported to examine the survey evidence in the record and found nothing "inconsistent with our conclusions." FTC Opin. 19 (1 App. 217). It specifically mentioned two pieces of survey material. *Id.* at 19 n.19. The first of these was data from a survey conducted in 1971 that purported to show the percentage of adult consumers who stated that Wonder stood out among all breads in helping children grow. This survey was offered on and addressed to the question of the extent to which Wonder bread was regarded by consumers as standing out among breads as a distinct source of nutrition, as alleged in paragraph 8(a) of the complaint. Elsewhere in its opinion the Commission explicitly concluded that such evidence is not equivalent to evidence that consumers have a view that Wonder is an extraordinary source of nutrition. FTC Opin. 32 (1 App. 230) . The survey shows nothing whatever about the number of consumers who regarded Wonder as "an extraordinary food" for producing "dramatic growth in children."

Moreover, the statistical data in this survey is useless for reaching any conclusions as to the meaning of advertising since consumer perceptions of a product may flow from many other sources, particularly its market share or whether it is the leading brand in the market.[24] Extensive

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[23] Further evidence of the Commission's unjustifiable approach may be found in Footnote 17 of its opinion, where the Commission admits that "[m]ost people above age six" would not be deceived by the growth sequence but concludes that it is deceptive anyway. FTC Opin. 18 n.17 (1 App. 216).

[24] The leading status of a brand such as Wonder may give rise to a "halo effect," a regular phenomenon of consumer psychology by virtue of which the brand is rated as better than its competitors on a variety of desirable attributes, whether or not they are advertised. I.D., Findings 64 and 65, as adopted by the Commission (1 App. 89, 182).

expert testimony was offered by both sides to analyze the statistical material in this and other surveys as it related to the issue being litigated. Without such analysis, simple brand rankings of the sort relied on by the Commission are meaningless.[25]

The Commission also pointed to an analysis it claimed to have conducted of survey evidence in the record that recorded the "verbatim responses" of adult consumers recently exposed to a Wonder advertisement when questioned as to the meaning of the advertisement. FTC Opin. 19 n.19 (1 App. 217). Although ITT Continental offered, on the paragraph 8 issues, an analysis of more than 1,300 of these verbatim responses related to Wonder's nutrition advertising (Jackson 2446-47 (2 App. 415-16)), the Commission for some reason confined its own analysis to only 709. Of these, it found "nearly 50" that it asserted indicated that consumers perceived the commercials to represent that Wonder bread induces "remarkable growth" (whatever that means).

However many "nearly 50" may be, at most less than seven percent of the responses examined could be claimed by the Commission to reflect any evidence that the advertising claimed that Wonder induced "remarkable" growth. As is indicated below, it is virtually certain that, assessed by proper legal standards, the total should be much lower. Even granting the Commission's figure of "nearly 50," however, we are not aware of any authority that a finding of misrepresentation can be based on six percent or less of the consuming public.[26] Such a small percentage proves

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[25] By way of example only, CX 157, which purported to represent an analysis of data by a Commission witness from the survey the Commission cited, shows that Wonder obtained far higher rankings by consumers on such unadvertised attributes as freshness and taste and that it actually performed worst on consumer rankings of its attributes for "helping children grow" and "nutrition." CX 157, at 3 (3 App. 491).

[26] The Commission itself has recently held that evidence that perhaps as many as four percent of persons surveyed understood advertising to contain

nothing as to deception for it is well established that any communication will be misunderstood by a small percentage of its audience. Bauer 2403 (2 App. 413).

If the Court, however, believes that such an insignificant percentage of the consuming public might be a sufficient predicate for a finding of misrepresentation, it still could not accept the Commission's analysis here, for the Commission has made it impossible to review the analysis. It specifically identified only two of the "nearly 50" comments it relied on and without knowing what the others were (and how many), judicial review of the analysis or of its significance is impossible.

Examination of the only two responses that the Commission did identify, however, plainly suggests that the Commission's analysis would not withstand judicial review and also indicates the generally invalid approach that the Commission took to the issues before it. Thus, the Commission concluded that the comment of a consumer who said that the advertising "tells you Wonder Bread helps your children grow ten feet tall" indicates face-value acceptance of the commercial. Is the Commission here *seriously* suggesting that, at face value, Wonder's advertising had the capacity to lead consumers to believe that Wonder would help their children grow *ten feet tall?*[27] The conclusion that this comment supports the Commission's belated construction of paragraph 10 is patently irrational.

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a particular representation was a "patently insubstantial" basis for finding that the representation was made. *In re* Bristol-Myers Corp., 3 CCH Trade Reg. Rep. ¶ 20,900 at 20,751 (FTC 1975).

A Court of Appeals has suggested in dictum that a finding of misrepresentation might be sustained on evidence that ten percent of the public was misled. Firestone Tire & Rubber Co. v. FTC, 481 F.2d 246, 249 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973). Wholly apart from the merit of that dictum, the percentage involved here is clearly significantly lower.

[27] In oral argument before the Court of Appeals for the District of Columbia Circuit, counsel for the Commission indicated that this is indeed the Commission's position.

The second comment that the Commission identified also clearly shows that included within the "nearly 50" upon which the Commission relied were the views of some consumers as to whom the advertising could not possibly have had the requisite deceptive potential. Thus, as quoted by the Commission, this comment was

> "There is one thing that really irritates me about this commercial and that is when the child is growing. It bothers me because he grows too fast." [28]

On its face, the comment of this consumer cannot validly be taken as evidence that the advertising had any capacity to deceive her; to the contrary, its effect was to "really irritate" her. How many others of the total of "nearly 50" uncovered by the Commission may also fall in this category is, of course, impossible to state in view of the Commission's failure to identify them.[29]

What emerges from a careful review of the Commission's opinion is that in assessing the deceptive capacity of the advertising at issue, the Commission applied wholly irrational standards and refused to follow the established rule that, for advertising to be held deceptive, it must be shown that there is "a likelihood or fair probability that the [consumer] . . . will be misled." *Ger-Ro-Mar, Inc.* v. *FTC*, 518 F.2d 33, 38 (2d Cir. 1975); *FTC* v. *Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963). Thus, the Commission concluded that the advertising was deceptive *because* it had "a great element of fantasy" and not *in spite* of that characteristic. Similarly, evidence that the advertising "really irritated" consumers is cited as evidence that the advertising had the capacity to deceive consumers. This simply

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[28] Even the Commission conceded that this comment, apparently typical of some subportion of the total of "nearly 50," reflected "some degree of skepticism." FTC Opin. 19 n.19 (1 App. 217).

[29] This is, of course, the sort of highly relevant question that could have been explored if notice of the issue raised by the Commission's opinion had been given prior to hearing.

does not amount to evidence that satisfies the controlling legal principles regarding the lawfulness of advertising.

What has happened, quite plainly, is that the Commission chose to ignore those principles in this case. Yet, even in one of its recent ground-breaking decisions, the Commission itself re-affirmed:

> "True, as has been reiterated many times, the Commission's responsibility is to prevent deception of the gullible and credulous, as well as the cautious and knowledgeable . . . . This principle loses its validity, however, if it is applied uncritically or pushed to an absurd extreme in respect of every conceivable misconception, however outlandish, to which [an advertiser's] . . . representations might be subject among the foolish or feeble-minded . . . . A representation does not become 'false and deceptive' merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed." [30]

The conclusion that Wonder's advertising had the capacity to deceive consumers by falsely portraying the product as an extraordinary food for producing dramatic growth in children is unsupported by the advertising or by any other record evidence.

There remains the question whether the Court should sustain the Commission's conclusion that Wonder's advertising was unlawful because it represented to *children* that the product was an extraordinary food for producing dramatic growth. As the next section shows, there is a procedural reason why this determination must be reversed. The Commission's conclusion, however, was also erroneous as a matter of law.

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[30] *In re* Pfizer, Inc., 81 F.T.C. 23, 65 (1972), *quoting In re* Kirchner, 63 F.T.C. 1282, 1290 (1963), *aff'd*, 337 F.2d 751 (9th Cir. 1964). In both *Pfizer* and *Kirchner*, the principle referred to was that enunciated by this Court in Charles of the Ritz Dist. Corp. v. FTC, 143 F.2d 676, 679 (2d Cir. 1944). Together with *Sterling Drug*, these Commission decisions thus establish the limitations that exist for the *Charles of the Ritz* doctrine.

As noted above (page 11, *supra*) the most that complaint counsel could claim on this issue was that

> "children below approximately the age of six tend to perceive the 'How Big' and 'Wonder Years' ads as promising that children will grow as quickly as the child depicted in the growth sequence." App. Br. 37 (1 App. 149).[31]

In its opinion on reconsideration, the Commission claimed that in its first opinion,

> "in dealing with the allegations of paragraph 10, we concerned ourselves only with the advertisements that were seen on children's programs and those TV commercials containing, for instance, the fantasy growth sequence, which commercials, although not shown on children's programs, were shown as early as 10 a.m. with *children* constituting a substantial part of the viewing audience." Opin. on Recons. 2 (1 App. 273) (emphasis in original).[32]

We have already noted the absence of any testimony or finding that CX 27, or advertisements like it appearing on children's television before September 1970 would give rise to the false portrayal alleged by paragraph 10.[33] And it

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[31] With respect to Wonder advertising on children's programs, such as CX 27, no testimony was given and no finding made that children would understand that advertising as promising dramatic growth from consumption of Wonder. *See* FTC Supp. Finding 16 (1 App. 192); Granger 528 (2 App. 333); Solnit 622-23 (2 App. 348-49). As noted elsewhere (page 13, n. 14, *supra*), CX 27 is conspicuously absent from the citations relied on in FTC Supp. Finding 17, where the Commission found that Wonder was advertised "to viewers" as an extraordinary food for producing dramatic growth in children. It thus appears that the Commission may have implicitly determined that advertising for Wonder that did not include the growth sequence did not convey the paragraph 10 representation.

[32] Actually, this statement is inaccurate since in dealing with the paragraph 10 issues in its opinion the Commission referred to newspaper advertisements as well. FTC Opin. 17 (1 App. 215).

[33] See page 9 n. 9, page 13 n. 14, and n. 31, *supra*. The single sentence with which the Commission brushed aside Wonder's children's commercials (FTC Opin. 17 (1 App. 215)) hardly rises to the stature of a finding of any sort on this issue.

simply is not conceivable that the Commission is correct in its view that advertising intended to reach adults can be judged unlawful simply on the basis of how it may be perceived by some very young children who happen to be in the viewing audience when it is broadcast. *See, e.g., In re Pfizer, Inc.*, 81 F.T.C. 23, 65 (1972); *In re Kirchner*, 63 F.T.C. 1282, 1290 (1963), *aff'd*, 337 F.2d 751 (9th Cir. 1964).[34] The nature of the television medium is such that this circumstance is inevitable, and the rule suggested by the opinion on reconsideration would be an impossible one for advertisers to live with. Wholly apart from the impracticality of such a rule—and the inevitable confusion and uncertainty that would arise from efforts to enforce it—we are not aware of any authority that permits the lawfulness of advertising for adults to be measured by the possible perceptions of the advertising by very young children.

For all the foregoing reasons, Wonder's advertising was not deceptive to any relevant audience. The Court should accordingly reverse the Commission's decision and instruct it to dismiss the complaint.

C. The Commission Could Not Find the Alleged Deception of Children Without Reference Either to the Initial Decision or to the Testimony in the Record.

As noted above, the extensive testimony of expert witnesses was received at the hearing concerning the possible perceptions of Wonder's advertising by very young children. This testimony, which was offered by both sides at the hearing, runs to approximately 500 pages of the trans-

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[34] FTC Supp. Finding 14 (1 App. 192), dealing with the audience to which Wonder's advertising was addressed, rests exclusively on CX 175 and CX 176 (3 App. 507-18). These two stipulations establish that women between the ages of 18-49 were the primary audience for Wonder's television advertising while acknowledging that some children under the age of 12 would be in the audience when the advertising was broadcast.

script. The Administrative Law Judge entered detailed findings summarizing this evidence and making clear why the record did not support a finding of deception of children. I.D., Findings 146-59 (1 App. 108-12).

In claiming to find that Wonder had been falsely portrayed to children "as an extraordinary food for producing dramatic growth," the Commission ignored this evidence and the findings of fact contained in the Initial Decision. In its Supplementary Findings of Fact, the Commission devoted a single irrelevant sentence to the substance of the expert testimony in the record, implying that it actually rejected the views of complaint counsel's witnesses that very young children might perceive the fantasy growth sequence as a statement of literal fact. *See* FTC Supp. Finding 16 (1 App. 192). Rather the Commission appears to have based its conclusions on nothing other than its own *de novo* review of the advertising in question, including (as articulated by the opinion on reconsideration) its erroneous conclusion that the advertising had the capacity to deceive adults and therefore must have deceived children.

In previous sections of this brief we demonstrated why it was error for the Commission to consider the deceptive capacity of the advertising for adults in deciding the paragraph 10 question, and further why the Commission's conclusions as to deception of both adults and children should be set aside. There is a further procedural reason, however, for reversal of the finding that the advertising was deceptive to children. The Commission was not free to decide this question, as it did, without meaningful reference either to the Initial Decision or to the testimony in the record. It has been said that due process requires that before the Commission reverses an Initial Decision, it must have at its "disposal as full an appreciation of *all* of the evidence as the person whose decision they are overturning." *Cinderella Career & Finishing Schools, Inc.* v. *FTC*,

425 F.2d 583, 585 n. 3 (D.C. Cir. 1970) (emphasis added). Moreover, the Commission

> "must consider that decision and the evidence in the record upon which it is based, rather than dismissing the proceedings at the hearing out of hand . . . . We hardly think it permissible for the Commission to draw . . . independent conclusions, while ignoring the record and consequently converting the entire hearing proceeding into a meaningless exercise, leaving it for the court to review the record to find whether there is evidence to support those conclusions." *Id.* at 588.
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> 'If [the Commissioners] . . . choose to modify or set aside [an examiner's] . . . conclusions they must state that they are doing so and they must give reasons for so doing." *Id.* at 589.

The Initial Decision here carefully canvassed the expert testimony on the question whether and if so why, very young children might misunderstand the fantasy growth sequence in the advertising to claim that Wonder was an extraordinary food for producing dramatic growth. I.D., Findings 146-59 (1 App. 108-12). These findings, together with the dismissal of the allegation by the Administrative Law Judge, were peremptorily swept aside by the Commission, with neither comment or explanation, in the very same manner condemned in *Cinderella* and elsewhere.[35]

In addition, as the Initial Decision reflects, the record contains a good deal of testimony relevant to this issue, none of which the Commission appears really to have considered. Thus, evidence was tendered that little is really known

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[35] Brennan v. Gilles & Cotting, Inc., 504 F.2d 1255, 1264 (4th Cir. 1974); NLRB v. Coletti Color Prints, Inc., 387 F.2d 298, 303 (2d Cir. 1967), *quoting* Oil, Chem. & Atomic Workers Int'l Union v. NLRB, 362 F.2d 943, 946 (D.C. Cir. 1966). The Commission adopted a few of the findings of the Administrative Law Judge on other issues, and then went on to further order "that the remainder of the Initial Decision be vacated" without any explanation for this action. Final Order at 1, 4 (1 App. 182, 185). The prejudice to ITT Continental from the Commission's handling of the Initial Decision is not, of course, limited to this issue.

about children's perceptions of television advertising because only a very limited amount of empirical research has ever been done on the subject. I.D., Finding 149 (1 App. 109-10). Each side also offered testimony of child psychiatrists concerning how those witnesses supposed very young children would perceive the fantasy growth sequence, what factors might influence such a perception, and how a child might respond to such a perception. *See* I.D., Findings 151-59 (1 App. 110-12). The Commission has ignored this testimony altogether in determining that Wonder was falsely advertised to children as an extraordinary food for producing dramatic growth.[36]

There are at least two reasons why the Commission, particularly in this case, should have thoroughly considered not only the Initial Decision but also all of the competent record evidence on children's perceptions of the Wonder advertising. First, the legal theory advanced by paragraph 10 was a novel one; that is, that the lawfulness of advertising intended for adults could be judged in light of its possible perception by very young children who might be in the audience when it was aired. Second, it is not conceivable that the Federal Trade Commission can legitimately claim any expertise whatever in this area of child psychology or children's perceptions as to which, as this record makes clear, so little is really known. Under these circumstances, full airing and consideration by the Com-

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[36] FTC Supp. Finding 16 (1 App. 192), which cited some testimony of these witnesses, was not addressed to this issue. It merely found, in part on the basis of distorted record citations, that children one (!) to twelve would understand the advertising as promising some growth capacity available only from Wonder. This is obviously an altogether different issue than the dramatic growth allegation of paragraph 10. Indeed, this treatment of the testimony of these witnesses may mean that the Commission actually rejected their view that young children would perceive the "growth sequence" as literal fact.

Moreover, as noted above, the reference to Dr. Littner's testimony in FTC Opin. 18 n. 1 (1 App. 216) appears to have been directed to the likely perception of the advertising by adults, particularly in light of the reference contained in that footnote to the question of "magical thinking" by adults.

mission of whatever competent and relevant testimony existed in the record was required.

D. The Commission's Order Is Not Reasonably Related to the Violation Found and Its Terms Are Not Sufficiently Precise.

Before addressing the specific terms of the Commission's order, it seems appropriate to re-state the results of the adjudication that gave rise to it. As noted at the outset of this brief, the complaint in this case challenged the nutritional advertising for both Wonder bread and Hostess snack cakes, levying a broad range of charges against both. After a lengthy evidentiary hearing, the complaint was dismissed in its entirety by the Administrative Law Judge. The Commission completely exonerated the advertising for Hostess and also dismissed the principal, and virtually every other charge that had been made as to Wonder bread. By torturing paragraph 10 beyond recognition, the Commission managed to salvage a single aspect of its complaint. In disregard of its own adjudications, it then proceeded to enter a cease and desist order of the broadest possible scope.[37]

This case thus presents a unique situation. Here it is the Commission, not the respondent, which, "having lost the battle on the facts, . . . hope[s] to win the war on the type of decree." *FTC* v. *National Lead Co.*, 352 U.S. 419, 429 (1957). Moreover, should this order be upheld in its present scope and form, one would have to conclude that an adjudicative proceeding before the Commission is a completely meaningless exercise.

It may well be true that the Commission has considerable discretion in framing its orders. *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Jacob Siegel Co.* v. *FTC*, 327

[37] In this section of our brief, we have attempted to avoid unnecessarily duplicating points as to the inadmissible scope and ambiguity of the Commission's order made in the brief of Petitioner Ted Bates & Company, Inc. We subscribe to those arguments, however, and wish to have them incorporated by reference in this brief insofar as they apply to ITT Continental.

U.S. 608, 611 (1946). But the remedy selected must bear a reasonable relation to the unlawful practices found to exist.[38] It is accordingly established that the courts "must still demand that there be some relation between the violations found and the breadth of the order." *Country Tweeds, Inc.* v. *FTC,* 326 F.2d 144, 148 (2d Cir. 1964); *see Federated Nationwide Wholesalers Serv.* v. *FTC,* 398 F.2d 253, 259-60 (2d Cir. 1968). A Commission order is overbroad where it serves no remedial purpose, bears no reasonable relationship to the violation found or forbids activities other than those which if continued would directly aid in perpetuation of the same old unlawful practices. *Lenox, Inc.* v. *FTC,* 417 F.2d 126, 128 (2d Cir. 1969); *Spiegel, Inc.* v. *FTC,* 411 F.2d 481, 484-85 (7th Cir. 1969); *see Seeburg Corp.* v. *FTC,* 425 F.2d 124, 129-30 (6th Cir.), *cert. denied,* 400 U.S. 866 (1970).

On any theory of violation suggested either by the Commission's opinion or its opinion on reconsideration the order here is overbroad. The order bears no relation at all to the only violation that the Commission could lawfully have even considered under paragraph 10 of the complaint; that is, false and exploitive advertising to children. The order's proscriptions go far beyond that violation to regulate ITT Continental's advertising without regard to its intended audience (FTC Opin. 29 (1 App. 227); Opin. on Recons. 5 (1 App. 276)), and yet nowhere does the Commission attempt to justify its pervasive regulation of all of ITT Continental's advertising in light of a violation consisting of false advertising to children.[39] The only pos-

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[38] FTC v. National Lead Co., 352 U.S. 419, 429 (1957).

[39] Under § 8(b) of the Administrative Procedure Act, 5 U.S.C. § 557 (c) (1970), an agency may not enter an order, even in the exercise of its discretion, with "no findings and no analysis . . . to justify the choice made. . . ." Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167 (1962). Without a clear articulation of the justification for an order, effective judicial review may not be possible. Baltimore & Ohio R.R. v. Aberdeen & Rockfish R.R., 393 U.S. 87, 92 (1968); SEC v. Chenery Corp., 318 U.S. 80, 94 (1943).

sible explanation for the excessive sanction imposed is that it is based on the Commission's conclusion as to deception of adults—an issue it could not lawfully consider. *See* pages 15-22, *supra*.

An additional general objection to this order is its application to the advertising for "any food product." In the circumstances of this case such sweeping product coverage is completely indefensible. The basic justification that the Commission advanced for extending its order to "any food product" was that nutrition

> "is a theme that may be abused in the promotion of any food product. In this context, broad product coverage is essential if adequate protection of the consuming public is to be obtained in this case." FTC Opin. 29 (1 App. 227).

This consideration is overcome by the fact that in this very proceeding the Commission considered whether ITT Continental had abused the nutrition theme in promoting another food product (Hostess), and concluded that it had not. FTC Opin. 22-24 (1 App. 220-22). It is completely inadmissible for the Commission to dismiss all charges against the advertising for Hostess and then enter an order broadly regulating the very advertising it has just exonerated.

Under analogous circumstances, a Court of Appeals has refused to sanction such an obvious abuse of the Commission's remedial powers.[40] *National Dairy Prods. Corp.* v. *FTC*, 412 F.2d 605 (7th Cir. 1969). There, the Commission

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[40] This is not to suggest that the Commission has not been allowed to issue orders applicable to products other than those directly involved in the proceeding giving rise to the order. *See, e.g.*, FTC v. Colgate-Palmolive, 380 U.S. 374, 394 (1965), where the Court sustained a prohibition against the deceptive use of mock-ups in advertising for all of the respondents' products. We are not aware, however, of any decision that has permitted the Commission to do so where (1) it has dismissed all allegations against a second product in the very same proceeding and (2) the substantive provisions of the order are as sweeping as those here.

had found a violation of the Robinson-Patman Act as to one line of products (fruit spreads), dismissed a similar charge as to another product (marshmallow topping), and gone on to enter an order covering "any . . . food product in the product line of [the] . . . Krafts Food Division . . . ." *Id.* at 623 n.11. The court said:

> "The order should have been formed to fit the case. The perpetual order so including all of the many existing and new future food products is too broad under the circumstances of this case. The order should have been limited to fruit spreads. The evidence does not support the conclusion that there is a reasonable basis to infer that the condemned practices and propensity of petitioner if used in connection with all other products would violate Section 2(a). In fact there is evidence to the contrary. The order as broadly stated would include marshmallow topping and the Commission has dismissed a Section 2(a) charge after finding there was no violation. The dismissal of the charge specially weakens the basis for the broad order." *Id.* at 623-24.[41]

Here, as in *National Dairy Prods.*, the only evidence concerning ITT Continental's use of a nutritional theme in advertising any product other than Wonder is that such advertising is completely truthful. Surely, this fact, confirmed by the Commission itself, must outweigh the unsupported speculation that the theme *might* be abused in advertising for some other food product, present or future.

Moreover, if the product coverage of this order is sustained, then one must ask what purpose was served by litigation of the charges against Hostess or even consideration of those charges by the Commission? The considerable ef-

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[41] *See also* Grove Labs. v. FTC, 418 F.2d 489, 496-97 (5th Cir. 1969); American Home Prods. Corp. v. FTC, 402 F.2d 232, 237 (6th Cir. 1968), in which the courts also refused enforcement of provisions of Commission orders that extended broadly beyond the products other than those as to which violations were found.

forts of complaint counsel, the respondents below, and the Commission itself with respect to Hostess advertising were an utterly meaningless exercise if the Commission is allowed to write this broad order covering advertising for Hostess and all other products besides Wonder.

The product coverage of the order, though demonstrably indefensible by itself, appears even more so when one considers the order's sweeping injunctive provisions, particularly paragraph I(3) (1 App. 184), which broadly proscribes nutritional misrepresentations as to any food product. In *American Home Prods. Corp.* v. *FTC,* 402 F.2d 232 (6th Cir. 1968), the court ordered stricken a provision in a Commission order enjoining the misrepresentation of the efficacy of "any drug." It said:

> "The proceedings in this case dealt exclusively with Preparation H; no other drug was involved. It was not established that petitioner is a habitual violator of the Federal Trade Commission Act, even though it is not a first offender. The effect of this provision of the Commission's order is to admonish petitioner not to violate the law again. Such an order would, in practical effect, transfer the task of enforcing the Federal Trade Commission Act, as regards this petitioner, to the district courts under 15 U.S.C. § 56. This is not within the contemplation of the Act." *Id* at 237.[42]

And, in *Grand Union Co.* v. *FTC,* 300 F.2d 92, 100 (2d Cir. 1962), this Court, pointed out that the remedial discretion of the Commission "does not permit an injunction of all violations of the statutes just because a single violation has been found."

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42 *See also* Swanee Paper Corp. v. FTC, 291 F.2d 833, 838 (2d Cir. 1961), *cert. denied,* 368 U.S. 987 (1962). Neither ITT Continental nor its predecessor corporation, Continental Baking Co., Inc., is a party to any litigated order of the Commission involving the advertising for any of its products. In Grove Labs v. FTC, 418 F.2d 49, 496-97 (5th Cir. 1969), the court took the same action as in *American Home Prods.*, though the petitioner or its parent had been the object of six formal proceedings, four of which led to litigated orders.

There is no justification for the extension of this order to products other than Wonder. Particularly in light of the dismissal of allegations against the nutritional advertising for Hostess, the application of this order, if sustained in any form, should be limited to the one product as to which the Commission claimed to find a violation.

In turning to the particular injunctions that the Commission issued, the Court should bear in mind not only the requirement that such orders bear a reasonable relationship to the violation found but also that they be intelligible. It is now axiomatic that

> "The severity of possible penalties . . . for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application."[43]

As will appear, this order is framed in language so imprecise that many of its provisions are invalid for that reason alone.

Paragraph I(1)(a) of the order prohibits advertising representations of

> "The nutritional properties of any [food] . . . product in generalized terms such as 'rich in nutrients,' vitamins or iron fortified, 'enriched,' or other similar nutritional references, unless the advertised nutritional value can be substantiated for the average and ordinary use of the product by consumers or by particular groups of consumers provided they are specified." (1 App. 183, 276-77).

No justification for this, or any of the other specific order provisions was undertaken in the Commission's opinion. In its opinion on reconsideration, the Commission attempted to justify this order provision by stating that a

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[43] FTC v. Henry Broch & Co., 368 U.S. 360, 367-68 (1962); *accord, e.g.*, William H. Rorer, Inc. v. FTC, 374 F.2d 622, 625 (2d Cir. 1967); Joseph A. Kaplan & Sons, Inc. v. FTC, 347 F.2d 785, 790 (D.C. Cir. 1965); *see* Federated Nationwide Wholesalers Serv. v. FTC, 398 F.2d 253, 260 (2d Cir. 1968).

major technique of Wonder's advertising was "repeated and exaggerated reference to the nutritional qualities of ITT's bread." Opin. on Recons. 3 (1 App. 274). This suggests that the Commission determined that the explicit nutritional claims made in Wonder's advertising were false. No such charge was ever made, and, in fact, in argument before the Commission, complaint counsel appeared to concede the truth of the explicit claims made in Wonder advertising. Oral Argument, April 18, 1973, Tr. 15, 26 (2 App. 466, 470). This order provision purporting to regulate such explicit claims bears no relation whatever to the violation found.

Moreover the terms of paragraph I(1)(a) are invalid in other respects. What, for example, is meant by such language as "in generalized terms" or "other similar nutritional references" or "can be substantiated" etc.? In short the terms of this paragraph are not sufficiently definite. As for the word "enriched," so long as Wonder is "enriched" within the standards established by the Food and Drug Administration (21 C.F.R. § 17.2), the Federal Food, Drug and Cosmetic Act requires Wonder to be identified as such. 21 U.S.C. §§ 331(b), 343(b), 333 (1970). There is accordingly no justification for regulating the use of this word in the manner proposed.[44]

Paragraph I(1)(b) enjoins any representations of

> "The comparative nutritional efficacy or value of [any food] . . . product without stating the brand, product or product category to which the comparison is being made." (1 App. 183).

This injunction obviously bears no relationship to the violation found, and evidently relates to the allegations of paragraph 8(a) which were dismissed. Once again one must ask what the point of this entire adjudication was if

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[44] One also wonders whether the reference in paragraph 1a to "vitamins or iron fortified" is not a back-handed swipe at the exonerated Hostess advertising which included a statement that the cakes were "fortified with vitamins and iron." *See* FTC Supp. Finding 21 (1 App. 194).

the Commission is to be permitted to enter an order like this.

The same question is raised by paragraph I(1)(c), by which ITT Continental is enjoined from making any representation of

> "The essentiality of [any food] . . . product as a source of a particular nutritional value if there are other food product categories which are also sources of the same or similar nutritional values, and unless the claim can be substantiated for the normal use of the product by consumers or by a particular group of consumers provided that they are specified." (1 App. 183).

In this very proceeding the Commission dismissed an allegation that Wonder was advertised "as a necessary food." It also dismissed allegations that Wonder supplied children with all "essential" nutrients.[45] In view of the dispositions of those allegations, it is simply inconceivable that the agency can be allowed then to turn around and attempt to regulate claims of "essentiality" in this manner.

Paragraph I(1)(d) proscribes representations of

> "The functional value or other attributes of any such product to a user through the use of demonstrations or other visual techniques unless the demonstrations are actual depictions of the actual value of the product by actual persons and represent the average and ordinary experience of consumers with the use of the product." (1 App. 184).

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[45] Indeed, the Commission purported to justify paragraph I(1)(c) by citing language contained in some of Wonder's advertising that the product contained "protein, minerals, carbohydrates and vitamins . . . all vital elements for growing minds and bodies." Opin. on Recons. 4 (1 App. 275). It was this very language that complaint counsel claimed gave rise to the representations alleged by paragraphs 8(b) and (c) of the complaint. App. Br. 13-14 (1 App. 143-44). *The Commission dismissed those allegations.* FTC Opin. 16 (1 App. 214).

In its opinion on reconsideration the Commission made clear that this order provision was inspired by the "growth sequence" in Wonder's advertising. Opin. on Recons. 5 (1 App. 276). As observed elsewhere in this brief (pages 25-27, *supra*), it is absurd to conclude that consumers would likely think that this growth sequence was an actual "demonstration" that consumption of Wonder bread would cause instantaneous growth. This order provision, therefore, is completely misconceived. Moreover, what is meant by the phrase "other visual techniques" and the language that follows it? This entire provision is so plainly imprecise and overbroad that it cannot possibly be justified.

Paragraph I(2) (1 App. 184) bears some superficial resemblance to the violation assertedly found but, in fact, goes well beyond it through the use of such words as "proper" and "substantial." These are of an entirely different order of magnitude than the asserted false representation of Wonder as an "extraordinary" food that produces "dramatic" growth. The order should at least be modified to eliminate the words "or proper" in the fifth line and "or substantial" in the sixth line.

Paragraph (I)3 of the order would prohibit any misrepresentation of the "nutritional content, efficacy of functional value to the user" of any food product of ITT Continental. (1 App. 184). Injunctions of such obvious overbreadth have many times been stricken in the past by both this Court and others. *See, e.g., Spiegel, Inc.* v. *FTC,* 411 F.2d 481, 484-85 (7th Cir. 1969); *American Home Prods. Corp.* v. *FTC,* 402 F.2d 232, 237 (6th Cir. 1968); *Libbey-Owens-Ford Glass Co.* v. *FTC,* 352 F.2d 415, 418 (6th Cir. 1965); *Country Tweeds, Inc.* v. *FTC,* 326 F.2d 144, 149 (2d Cir. 1964). *See also Korber Hats, Inc.* v. *FTC,* 311 F.2d 358, 364 (1st Cir. 1962).

It may well be the case that "those caught violating the Act must expect some fencing in." *FTC* v. *National Lead Co.,* 352 U.S. 419, 431 (1957). This principle does not

mean, however, that having purported to sustain only one of numerous allegations of its complaint, the Commission can then erase the results of its own adjudicative process and throttle an advertiser in the manner it is attempting to achieve here. Paragraphs I(1) and (3) of the order should be entirely stricken and if sustained at all, paragraph I(2) should be modified as suggested above and limited to advertising for Wonder bread that is primarily directed to children.

VI. CONCLUSION

The Commission's orders should be reversed and the case remanded with instructions to dismiss the complaint. At the least, the Court should remand for further proceedings not inconsistent with its opinion. Should the Court sustain the Commission's limited finding of violation, it should require modification of the order along the lines set forth above.

Respectfully submitted,

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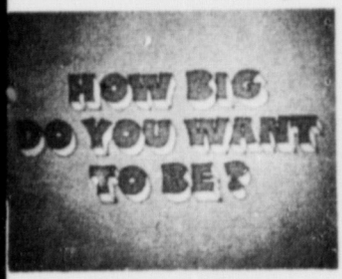
October 15, 1975

APPENDIX A

APPENDIX B

ED BATES & COMPANY
Advertising

CLIENT: ITT CONTINENTAL BAKING COMPANY
PRODUCT: WONDER BREAD
AS FILMED TV COMM'L NO: WB-904 DATE: 6/22/70
TITLE: "BIKE/TRIKE II" LENGTH: 30 SECONDS



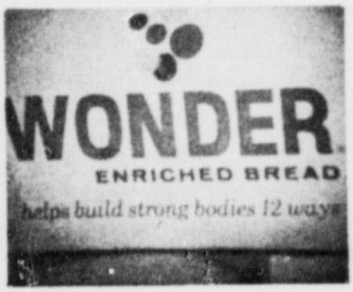
1. (MUSIC THROUGHOUT) ANNCR: Wonder asks how big do you want to be?

2. (MUSIC)

3. CHILD 1 : Big enough to see the parade.

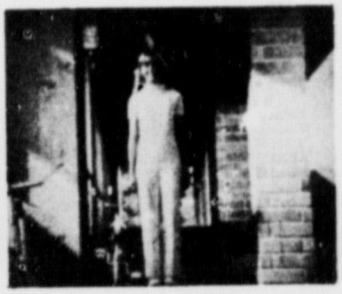
4. CHILD 2 : Big enough to ride a two-wheeler.

5. ANNCR: And you can help them grow bigger and stronger

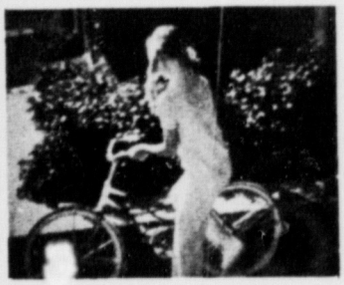


6. with Wonder Enriched Bread.

7. Wonder supplies needed vitamins and minerals



8. to help your child get bigger and stronger



9. during the years one through twelve

10. when she grows to 90% of her adult height.

11. Delicious Wonder Bread.

12. Wonder helps build strong bodies 12 ways.

ADDENDUM

ADDENDUM

Statutes and Regulations Involved

1. Section 5 of the Administrative Procedure Act (5 U.S.C. § 554) provides in pertinent part:

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . . .

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted. . . .

2. Relevant provisions of Sections 5, 12 and 15 of the Federal Trade Commission Act (15 U.S.C. §§ 45, 52, 55) are as follows:

§ 45. Unfair methods of competition unlawful; prevention by Commission—Declaration of unlawfulness; power to prohibit unfair practices

(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

* * * *

Proceeding by Commission; modifying and setting aside orders

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a

notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. . . .

* * * *

Review of order; rehearing

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. . . .

§ 52. Dissemination of false advertisements—Unlawfulness

(a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

Unfair or deceptive act or practice

(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be a unfair or deceptive act or practice in commerce within the meaning of section 45 of this title.

§ 55. Additional definitions

For the purposes of sections 52 to 54 of this title—

False advertisement

(a) (1) The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. . . .

TED BATES & COMPANY
Advertising

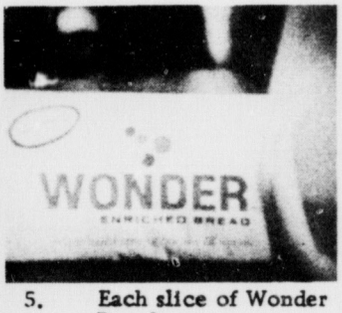
CLIENT: ITT CONTINENTAL BAKING COMPANY
PRODUCT: WONDER BREAD WB-895AX,
AS FILMED TV COMM'L NO: WB-895A
TITLE: "JUMP ROPE" (OPAQUE)
DATE: 7/2/69
LENGTH: 30 SECONDS

1. (MUSIC)

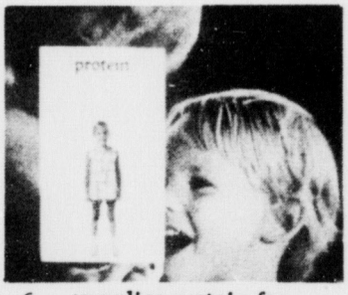
2. ANNCR: (VO) These are the Wonder Years...

3. ages one through twelve...

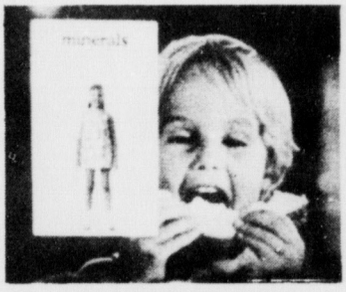
4. when your child actually grows to 90% of her adult height.



5. Each slice of Wonder Bread

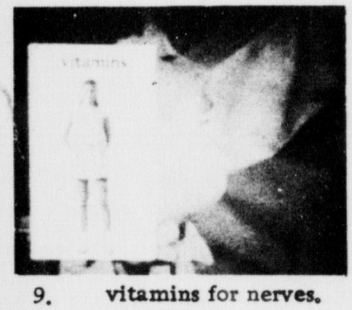


6. supplies protein for muscle



7. minerals for strong bones and teeth

8. carbohydrates for energy

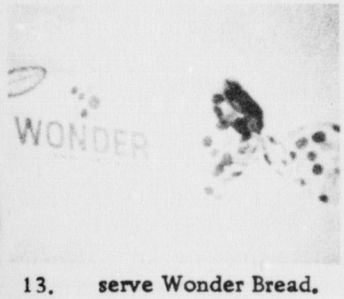


9. vitamins for nerves.

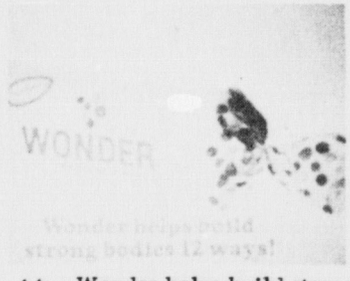
10. All vital elements

11. for growing minds and bodies.

12. To help make the most of these Wonder Years,



13. serve Wonder Bread.



14. Wonder helps build strong bodies 12 ways.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ITT CONTINENTAL BAKING COMPANY, INC., Petitioner, v. THE FEDERAL TRADE COMMISSION, Respondent.	)	No. 75-4141
TED BATES & COMPANY, INC., Petitioner, v. THE FEDERAL TRADE COMMISSION Respondent.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have today served the Brief of Petitioner ITT Continental Baking Company, Inc. upon all other parties to this case by causing two copies thereof to be hand-delivered, together with a copy of this certificate,

to the following persons:

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Dated: October 15, 1975